SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse, Department 73

19STCV05402
DANA J TOMARKEN vs NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC., et al.

August 12, 2019
8:30 AM

Judge: Honorable Christopher K. Lui
Judicial Assistant: M. Y. Carino
Courtroom Assistant: E. Villanueva

CSR: D. A. Salyer, CSR#4410
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Christine M. Adams

For Defendant(s): Anthony Joseph Oncidi and Philippe (Phil) Lebel

NATURE OF PROCEEDINGS:
Case Management Conference

Ruling on Submitted Matter

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, David A. Salyer, CSR#4410, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Judge Rafael A. Ongkeko is on a temporary assignment in another department. Judge Christopher K. Lui is covering all matters for Department 73.

The matters are called for hearing.

The Court had issued a its ruling on the submitted matter which shall be entered in the system this date. The Court continues the Case Management Conference to allow parties to review the Court's ruling on the submitted matter.

Case Management Conference is continued to 10/11/2019 at 08:30 AM in Department 73 at Stanley Mosk Courthouse.

Notice is waived.

AFTER HEARING:
The Court, having taken the matter under submission on 06/12/2019, now rules as follows:

The Petition to Compel Arbitration and Dismiss or Stay Proceedings (Res ID: 0610) filed by

Musicares Foundation, Inc., National Academy of Recording Arts & Sciences, Inc., Grammy Museum Foundation, Inc., Grammy Foundation, Inc. on 04/16/2019 is Denied.

Defendants' request for sanctions is DENIED.

Summary of Case

Plaintiff Dana J. Tomarken ("Plaintiff") sues Defendants National Academy of Recording Arts & Sciences Inc., MusiCares Foundation Inc., Grammy Museum Foundation Inc., Grammy Foundation Inc. ("Defendants") for the Recording Academy leadership's efforts to cover up misconduct and hide MusiCares' hostile and discriminatory workplace culture.

The Academy's main activities include the Grammy Awards. MusiCares and the Grammy Museum are non-profit organizations established by and affiliated with the Academy. The Grammy Foundation was a non-profit organization also established by and affiliated with the Academy—but merged into the Grammy Museum in May 2017. Plaintiff, a 75-year-old woman worked as Defendants' employee for 25 years—from July 15, 1993 until April 16, 2018, when her employment was terminated for a single late pledge payment. At the time her employment was terminated, Plaintiff held the title of Vice President, MusiCares/Grammy Foundation. Plaintiff alleges Defendants' decision to terminate her was pretextual and that Defendants actually terminated her employment when it became clear and inevitable that Tomarken would report CEO and President Neil Portnow's misconduct to the Board of Directors. (See Compl., ¶¶ 2-5.)

On February 14, 2019, Plaintiff filed this lawsuit against Defendants for:

C/A 1: Violation of Labor Code § 1102.5
C/A 2: Wrongful Termination in Violation of Public Policy
C/A 3: Discrimination Based on Sex in Violation of FEHA
C/A 4: Discrimination Based on Age in Violation of FEHA
C/A 5: Unlawful Retaliation in Violation of FEHA
C/A 6: Failure to Prevent Retaliation and Discrimination
C/A 7: IIED

On April 16, 2019, Defendants filed this motion to compel arbitration.
On April 17, 2019, Defendants filed a notice of errata, indicating the incorrect document title appears in the footer of certain pages of their motion.

On May 30, 2019, Plaintiff filed an opposition.
On June 5, 2019, Defendants filed a reply.
On June 12, 2019, the court heard oral argument and took the matter under submission.

Summary of Issues

Per Code of Civil Procedure sections 1281.2 and 1281.4, Defendants move to compel arbitration and dismiss/stay proceedings because: (1) Plaintiff executed a Mutual Agreement to Mediate and/or Arbitration Agreement on May 15, 2006; (2) Plaintiff refused to participate in mediation or submit her claims to arbitration per the agreement terms; (3) Defendants have not waived their right to compel mediation or arbitration; and (4) no grounds exist for revocation of the agreement. And per section 128.5(a), Defendants request $15,645 in sanctions against Plaintiff and her counsel for failing to mediate and arbitrate.

In opposition, Plaintiff argues the agreement is procedurally unconscionable because: (1) she did not have the ability to negotiate the agreement after she had already been employed with Defendants for over a decade; (2) Plaintiff was unaware that she could opt out of the agreement; (3) the prolix provisions are evidence of unfair surprise in the agreement, i.e., the effect of paragraphs D and E is that Plaintiff is required to submit her claims to mediation within less than one year from the date she knew or some person unknown to her decides she would have known of the claims—while Defendants are not required to attempt to mediate first and can proceed directly to arbitration; (4) Defendants never provided Plaintiff a copy of the "then-current" JAMS rules and does not advise Plaintiff where or how she might obtain a copy of the rule; and (5) because paragraph G(c) incorporates paragraph M, the entire provision is incomprehensible, i.e., G(c) provides that an arbitrator does not have the authority "in the absence of a written waiver pursuant to paragraph M below, hear or decide any matter that was not processed in accordance with this Agreement" but paragraph M is regarding to injunctive relief—not waiver. And Plaintiff argues that the agreement is substantively unconscionable because: (1) it contains a one-sided limitation on the statute of limitations, which have the e pernicious effect of forcing Plaintiff to waive her FEHA-based claims, as well as any other potential claims under the California Government and Labor Codes, well before the limitations period would expire under the law; (2) the unilateral mediation requirement favors Defendants, who are able to directly request arbitration, but yet get a "sneak peek" at Plaintiff's evidence through required mediation of Plaintiff's claims; (3) paragraph J of the agreement, which prevents Plaintiff from initiating an administrative charge of discrimination (i.e., a DFEH charge) improperly precludes administrative action; and (4) paragraph K of the agreement, which mandates a confidential arbitration, combined with JAMS Rules 17 (providing discovery to the extent arbitrator

considers necessary) and 26 (presumption that all arbitrations being confidential) unfairly disadvantages Plaintiff from being able to prove her discrimination and retaliation claims.

In reply, Defendants argue: (1) Plaintiff raises no specific challenge to the delegation clause, an arbitrator must resolve Plaintiff's other meritless contentions; (2) regardless of the delegation clause, there no procedural unconscionability because (a) Plaintiff presents no evidence that she failed to see or understand the time periods applicable to each stage of the dispute, (b) incorporation of the JAMS rules is not problematic because, unlike the cases Plaintiff relies on, the agreement specifies what rules apply and the rules incorporated do not conflict with any provision of the agreement, (c) the typographical error in paragraph G is irrelevant because anyone reading the agreement in its entirety and encountering both paragraph I (which is a single sentence addressing only waiver) and paragraph M (which is a single sentence addressing only injunctive relief) would understand that the reference to paragraph M within paragraph 6 was a simple typographical error; and (3) there is no substantive unconscionability because (a) the agreement actually extends the statute of limitations in circumstances where the parties mediate after, or less than 15 days before, the limitations period would expire, (b) the mediation provision is not unconscionably one-sided is based on Plaintiff's misunderstanding; the mediation requires both sides present their positions in a "good faith" attempt to resolve the claims, (c) federal law allows an arbitration agreement to limit administrative actions, and (d) the agreement does not unconscionably require confidentiality—it simply states it will be conducted in private—the cases Plaintiff relies on involved limitations on a party's right to discuss claims, not provisions requiring private arbitration. Defendants argue that none of the contentions Plaintiff raises warrants a finding of unconscionability, but even if they did, they are collateral to arbitration and primarily relate to the mediation provision.

Defendants assert that, in the event the court concludes unconscionability, it should sever the mediation provision and compel Plaintiff to arbitrate without first mediating. Lastly, Defendants argue that Plaintiff's conclusory assertion that Defendants' attorney fees are excessive ignores the fact that Defendants could not tailor their arguments to what was truly in dispute because Plaintiff's counsel never followed through with their promise to explain their position.

ANALYSIS

Whether CAA or FAA Applies?

The Federal Arbitration Act (9 U.S.C. §§ 1-14) governs contractual arbitration in written contracts involving interstate or foreign commerce or maritime transactions.

The Federal Act provides for enforcement of arbitration provisions in any contract "evidencing a transaction involving commerce." (9 U.S.C. § 2; see Rent-A-Center, West, Inc. v. Jackson (2010) 561 U.S. 63, 67.) The words "evidencing a transaction" mean only that the transaction must turn out, in fact, to involve interstate commerce—the parties need not have intended any interstate activity when they entered into the contract. (Allied-Bruce Terminix Companies, Inc. v. Dobson (1995) 513 U.S. 265, 276.)

Here, Defendants argue the FAA applies because: (1) Plaintiff was employed by MusiCares, which transacts business with organizations in numerous states, including as part of its Person of the Year Gala, which Plaintiff was involved in planning and executing (see Frizzi Decl., ¶ 7 [stating annual Person of the Year Gala has been held in Los Angeles and New York City]); and (2) Plaintiff also agreed to arbitrate any claims against each of the Defendants, who also transact business with organizations in multiple states. (id., ¶¶ 6, 8). Plaintiff does not offer any evidence or argument to rebut Defendants' claims of interstate commerce. Accordingly, the court applies the FAA.

Applying FAA

The FAA generally confines the court's analysis to two issues: (1) whether the arbitration agreement encompasses the dispute at issue; and (2) whether the arbitration agreement is valid and enforceable. (Chiron Corp. v. Ortho Diagnostic Systems, Inc. (9th Cir. 2000) 207 F.3d 1126, 1130.) State courts may, without violating the FAA, "decline to enforce arbitration clauses on the basis of 'generally applicable contract defenses, such as fraud, duress or unconscionability.' " (Erickson v. Aetna Health Plans of California, Inc. (1999) 71 Cal.App.4th 646, 650-651.) Thus, "under both the FAA and California law, 'arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " (Higgins v. Superior Court (2006) 140 Cal.App.4th 1238, 1247.)

Here, the parties do not disagree that the arbitration agreement encompasses the dispute at issue. Rather, the parties dispute whether the arbitration agreement is valid and enforceable. Defendants argue: (1) per the delegation clause, the issue of arbitrability is for the arbitrator to decide—not the court; and (2) regardless, the arbitration agreement is not unconscionable. In contrast, Plaintiff argues that the delegation clause and the arbitration agreement are both unconscionable.

A. Delegation Clause

"A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration." (New Prime Inc. v. Oliveira (2019) 139 S.Ct. 532, 538.) To be enforceable, a delegation clause must satisfy two prerequisites: (1) the language must be clear and unmistakable, and (2) the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability. (Pinela v. Neiman Marcus Group, Inc. (2015) 238 Cal.App.4th 227, 240.)

A delegation clause nested within the larger arbitration agreement must be viewed as an independent, i.e., severable, contract. (Rent–A–Center, supra, 561 U.S. at 70-71.) Under this severability principle, a challenge to the validity of a delegation clause is treated separately from a challenge to the validity of the entire contract in which it appears. (New Prime Inc. v. Oliveira (2019) 139 S.Ct. 532, 538; citing Rent-A-Center, supra, 561 U.S. at 68-69.)

In Rent-A-Center, the court found the issue of arbitrability was for the arbitrator to determine because plaintiff never mentioned the delegation provision in its challenge to the arbitration agreement. (Rent-A-Center, supra, 561 U.S. at 72.) Following Rent-A-Center, California courts have recognized that a court is the appropriate entity to resolve challenges to a delegation clause nested in an arbitration clause when a specific contract challenge is made to the delegation clause. (See, e.g., Jackpot Harvesting, Inc. v. Applied Underwriters, Inc. (2019) 33 Cal.App.5th 719, 731; Nielsen Contracting v. Applied Underwriters (2018) 22 Cal.App.5th 1096, 1107 [plaintiff's challenge to enforceability of delegation clause—that it was void and unenforceable for failure to obtain approval of Insurance Commissioner—was adequate to require judicial resolution of challenge]; Malone v. Superior Court (2014) 226 Cal.App.4th 1551, 1559-1560.) A plaintiff need not provide an "analytically distinct" argument to satisfy the severability principle per Rent-A-Center. (See Jackpot, supra, 33 Cal.App.5th at 731 [rejecting "analytically distinct" argument, in part, because defendants' proposed rule could not be reconciled with Rent-A-Center's explanation "of how the plaintiff in that case hypothetically could have—but did not—establish the infirmity of the delegation clause at issue with respect to matters outside the clause itself"].)

Here, contrary to Defendants argument, Plaintiff does actually challenge the delegation clause and specifically argues it is unconscionable. (See Opp., pp. 12-13.)[1] Accordingly, the court has authority to determine whether the delegation clause is enforceable. Because the parties do not dispute that the delegation clause is clear and unmistakable, the only issue is whether the delegation clause is unconscionable.

1. Whether the Delegation Clause is Procedurally Unconscionable?

Procedural unconscionability concerns the way the contract was negotiated and the circumstances of the parties at that time. “The procedural element focuses on two factors: ‘oppression’ and ‘surprise.’ ‘Oppression’ arises from an inequality of bargaining power which results in no real negotiation and ‘an absence of meaningful choice.’ ‘Surprise’ involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.” (A & M Produce Co. v. FMC Corp. (1982) 135 Cal.App.3d 473, 486 [citations omitted].) “Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. ‘The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” ’ ....‘A finding of a contract of adhesion is essentially a finding of procedural unconscionability.’ ” (Baxter v. Genworth North America Corp. (2017) 16 Cal.App.5th 713, 723 [citations omitted].) “Few employees are in a position to forfeit a job and the benefits they have accrued for more than a decade solely to avoid the arbitration terms that are forced upon them by their employer.” (Fitz v. NCR Corp. (2004) 118 Cal.App.4th 702, 722.)

A “meaningful opportunity” to negotiate or reject the terms of a contract requires, at a minimum, that a party have reasonable notice of the opportunity to negotiate or reject and an actual, meaningful, and reasonable choice to exercise that discretion. (Mohamed v. Uber Technologies, Inc. (9th Cir. 2016) 848 F.3d 1201, 1211 [applying California law to find delegation provisions in arbitration agreement not adhesive or procedurally unconscionable because drivers were given meaningful opportunity to opt out].) “When the weaker party is presented the clause and told to ‘take it or leave it’ without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.” (Szetela v. Discover Bank (2002) 97 Cal.App.4th 1094, 1100; accord Pinela v. Neiman Marcus Group, Inc. (2015) 238 Cal.App.4th 227, 249 [finding delegation clause was procedurally unconscionable because it was offered, along with the rest of the agreement, on a take-it-or-leave-it basis, and contained a Texas choice of law provision that made it less likely that an unsophisticated layperson like plaintiff would understand how arbitrability questions would be resolved under the agreement].)

Plaintiff asserts that the agreement and delegation clause were presented on a take-it-or-leave it basis and that she was not aware that she could opt out (nowhere in the agreement does it mention the ability to do so). Plaintiff presents evidence that, at the time she signed the agreement, she had been working at the company for approximately a decade. Defendants do not present any evidence to support that the delegation clause is procedurally unconscionable.

Instead, Defendants argue that, even if the court credits the assertion that the agreement contains a degree of procedural unconscionability, it is not substantively unconscionable and thus still enforceable. Notwithstanding, it is undisputed that Plaintiff was presented the delegation clause on a take-it-or-leave it basis. Moreover, the court notes that the agreement (and thus delegation clause) contains no choice of law provision, which makes it less likely that an unsophisticated layperson like Plaintiff would understand how any arbitrability questions would be resolved under the agreement. Accordingly, the delegation clause is procedurally unconscionable.

2. Whether the Delegation Clause is Substantively Unconscionable?

Substantive unconscionability focuses on the terms of the agreement and whether those terms are "so one-sided as to 'shock the conscience.' " (Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1330.) A contractual provision that is substantively unconscionable "may take various forms, but may generally be described as unfairly one-sided." (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071.) "[T]he paramount consideration in assessing [substantive] conscionability is mutuality." (Abramson v. Juniper Networks, Inc. (2004) 115 Cal.App.4th 638, 657.) A delegation clause in an employment arbitration agreement is substantively unconscionable if it imposes unfair or one-sided burdens that are different from the clause's inherent features and consequences. (Tiri v. Lucky Chances, Inc. (2014) 226 Cal.App.4th 231, 238 [finding delegation clause not substantively unconscionable, where it was neither overly harsh nor caused one-sided results]; see also Nielsen, supra, 22 Cal.App.5th at 1107; Aanderud v. Superior Court (2017) 13 Cal.App.5th 880, 891 [delegation clause was enforceable where (1) delegation clause was clear and unmistakable, (2) neither severability provision nor provisional remedies clause rendered delegation clause ambiguous, and (3) clause was not revocable under unconscionability principles].) In Pinela, supra, 238 Cal.App.4th 227, the court found the delegation clause was substantively unconscionable because the Texas choice of provision eliminated the plaintiff's ability to argue the agreement was unconscionable under California law. (Ibid.)

Defendants argue that the delegation clause is not substantively unconscionable because it is bilateral—binding on both parties and provides for the selection of a neutral arbitrator by agreement of the parties or through a selection process from a list of names issued by JAMS. Defendants, however, fail to address the fact that application of the delegation clause would cause overly harsh and one-sided results. Overlooking the paragraph's erroneous reference to paragraph M instead of I, the sentence preceding the delegation clause expressly states that the arbitrator has no authority to "hear or decide any matter that was not processed in accordance with this Agreement" unless there is written waiver. As a result, because Plaintiff failed to

mediate her claims first, the arbitrator does not have authority to determine the arbitrability issues. (See Frizzi Decl., ¶ 10, Ex. 1, Internal Ex. A, pp. 2-3, ¶ D [stating "the Employee shall request a non-binding mediation" to pursue a claim].) Conversely, if Defendants had filed this lawsuit without initiating mediation first, the arbitrator would have authority because the agreement does not require Defendants to go through mediation. (See ibid. [stating "the Company may request a non-binding mediation where appropriate and practicable"].) As such, the enforceability of the delegation clause imposes an unfair and one-sided burden that is different from the clause's inherent features and consequences. The exercise of the delegation clause is substantively unconscionable.

Because the delegation clause is both procedurally and substantively unconscionable, the delegation clause is unenforceable. The court thus determines if the arbitration agreement is valid and enforceable.

B. Arbitration Agreement

As an initial matter, the arbitration agreement can be said to be procedurally and substantively unconscionable for the same reasons the delegation clause is procedurally and substantively unconscionable. However, as discussed below, there are additional provisions in the agreement that add to the unconscionability of the agreement.

1. Whether the Arbitration Agreement is Procedurally Unconscionable?

Arbitration agreements often incorporate the rules of an arbitration service provider (e.g., JAMS, AAA, etc.). Such agreements might be procedurally unconscionable if the employee is not provided a copy of the rules in advance, because the employee is forced to go to another source to learn the full ramifications of the arbitration agreement. (E.g., Carbajal v. CWPSC, Inc. (2016) 245 Cal.App.4th 227, 244-246 [finding "moderate" procedural unconscionability" on basis of several factors, including employer's failure to specify "which of AAA's nearly 100 different sets" of rules would apply]; Zullo v. Superior Court (2011) 197 Cal.App.4th 477, 485-486 [finding it oppressive to require employee to make independent inquiry to find rules in order to fully understand what employee was about to sign].) Here, the agreement provides "[t]he arbitration shall be conducted in accordance with the then-current Employment Arbitration Rules and Procedures of JAMS before a single arbitrator." Nowhere does the agreement explain what JAMS is. More importantly, nowhere does the agreement explain how to locate a copy of the "then-current" JAMS rules that would apply. Combined with the adhesiveness of the agreement (and delegation clause) discussed above, the agreement is procedurally unconscionable.

2. Whether Arbitration Agreement is Substantively Unconscionable?

Arbitration clauses that narrow the statutory limitations period too drastically may jeopardize the enforceability of the arbitration agreement. (See Wherry v. Award, Inc. (2011) 192 Cal.App.4th 1242, 1249 [finding arbitration agreement held substantively unconscionable for various reasons, including fact that 180-day deadline to demand arbitration was "far shorter than the minimum one-year statute for FEHA claims"].) Although the California Supreme Court has not decided this issue, it has held that where the employee claims discrimination in violation of the FEHA, elements of essential fairness must permit the employee to vindicate statutory rights. (See Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 90-91, 118; Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal.App.4th 1267, 1283, fn. 12 [180-day deadline shortened employee's time for bringing claims by more than 3 1/2 years—but this factor by itself does not show arbitration contract was substantively unconscionable]; Tompkins v. 23andMe, Inc. (9th Cir. 2016) 840 F.3d 1016, 1031-1033 [applying California law and finding provision establishing one-year statute of limitations for any claim did not render arbitration provision unconscionable because provision applied to claims brought by both parties who had freedom to modify limitations period]; Davis v. O'Melveny & Myers (9th Cir. 2007) 485 F.3d 1066, overruled on other grounds in Ferguson v. Corinthian Colleges, Inc. (9th Cir. 2013) 733 F.3d 928, 937 [holding dispute resolution program requiring employees to give written notice of any claim, together with a demand for mediation, within one year of discovery of the claim (or else result in waiver) is a substantively unconscionable time limit that forces an employee to arbitrate employment-related statutory claims that undermines the employee's ability to assert a "continuing violation" theory under FEHA].)

Because the agreement requires the employee to go through mediation first, the mediation provision unconscionably alters the statute of limitations for Plaintiff's claims. Defendants correctly point out that the agreement provides that both parties must provide a written notice of arbitration "within (15) working days from termination of the mediation, or within the time period prescribed by the statute of limitations applicable to a party's Claims, whichever is later." (Emphasis added.) However, Defendants omit the fact that, for the employee's request for arbitration to be proper (and for the arbitrator to have authority to hear and determine the claims), the employee must have already requested nonbinding mediation within "one (1) year after the party requesting mediation initially knew or should have known of the facts that gave rise to the Claim, or within thirty (30) working days of the date of the final written response or decision rendered as a result of the dispute resolute process described in paragraphs A through C, above, whichever is sooner." (Emphasis added.) Because of the required mediation, at

maximum, Plaintiff would only have one year from the date she knew or should have known of the facts that gave rise to her claims. This time period could, however, be shortened, if Plaintiff initially presented the claim through the alternate dispute resolution. In contrast, the agreement does not alter the statute of limitations for Defendants' claims because mediation is not required.

a. Severability

Arbitration agreements "permeated" by unconscionability are unenforceable. (See Armendariz, supra, 24 Cal.4th at 122; Samaniego v. Empire Today LLC (2012) 205 Cal.App.4th 1138, 1149.) Severance is not appropriate where the agreement is completely one-sided, compelling the employee, but not the employer, to arbitrate all claims. (O'Hare v. Municipal Resource Consultants (2003) 107 Cal.App.4th 267, 279.) Nor is severance appropriate where there are multiple provisions in an arbitration agreement rendering it substantively unconscionable, and no single provision may be stricken to remove the "unconscionable taint" from the agreement. (Nyulassy, supra, 120 Cal.App.4th at 1288.)

Defendants argue that none of Plaintiff's contentions warrant a finding of unconscionability, but if any did, they are collateral to arbitration and primarily relate to the mediation provision. If the court concludes otherwise, Defendants request the court simply sever the mediation provision and compel Plaintiff to arbitrate without first mediating. Defendants' argument is unpersuasive. As discussed above, the unconscionability is based on multiple provisions in the agreement—not just the mediation requirement, including the lack of attachment of rules and the arbitrator's lack of authority to hear or determine any issues when the agreement is violated.

In sum, although there is evidence of procedural unconscionability and a larger degree of substantive unconscionability. Severing the mediation requirement provisions would not change the court's conclusion regarding the unenforceability of the arbitration agreement. Defendants' motion to compel arbitration is DENIED.

Request for Stay

Code of Civil Procedure section 1281.4 provides: "If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." Because the court denies Defendants' motion to compel

arbitration, Defendants' request to stay proceedings is denied as MOOT.

Request for Sanctions

Per Code of Civil Procedure section 128.5(a), Defendants' request the court to sanction Plaintiff and her counsel in the amount of $15,645. That section provides: "[a] trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3." (Code Civ. Proc., § 128.5(a).)

Because the court denies Defendants' motion to compel arbitration, Defendants' request for sanctions is DENIED. Moreover, even if the court granted Defendants' motion, the court would deny Defendants request because a "[a] motion for sanctions under [128.5] shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5(f)(1)(A).)

Clerk is to give notice. Certificate of Mailing is attached.